No. 3649

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United States
Circuit Court of Appeals
For the Ninth Circuit

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Plaintiff in Error,

vs.

H. E. FOLEY,

Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Arizona

Brief Plaintiff in Error

Filed this ..... , 1921.

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Clerk United States Circuit Court of Appeals for the Ninth Circuit.

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Admit service of two copies of within Brief of Plaintiff in Error, this ..... , 1921.

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INDEX

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STATEMENT OF CASE

This case involves the construction and application of what is commonly known as "Adamson Act", 39 Statutes at Large, page 721, approved September 3, 1916, in relation to the wage scale existing between Plaintiff in Error and Defendant in Error.

For convenience the Adamson Act is quoted in full:

"An act to establish an eight-hour day for employees of carriers engaged in interstate and foreign commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That beginning January first, nineteen hundred and seventeen, eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed by any common carrier by railroad, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, which is subject to the provisions of the Act of February fourth, eighteen hundred and eighty-seven, entitled "An Act to regulate commerce," as amended, and who are now or may hereafter be actually engaged in any capacity in the operation of trains used for the transportation of persons or property on railroads, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, from any State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States; *Provided,* That the above exceptions shall not apply to railroads though less than one hundred miles in length whose principal business is leasing or furnishing terminal or transfer facilities to other railroads, or are themselves engaged in

transfers of freight between railroads or between railroads and industrial plants.

SEC. 2. That the President shall appoint a commission of three, which shall observe the operation and effects of the institution of the eight-hour standard workday as above defined and the facts and conditions affecting the relations between such common carriers and employees during a period of not less than six months nor more than nine months, in the discretion of the commission, and within thirty days thereafter such commission shall report its findings to the President and Congress; that each member of the commission created under the provisions of this Act shall receive such compensation as may be fixed by the President. That the sum of $25,000, or so much thereof as may be necessary, be, and hereby is, appropriated, out of any money in the United States Treasury not otherwise appropriated, for the necessary and proper expenses incurred in connection with the work of such commission, including salaries, per diem, traveling expenses of members and employees, and rent, furniture, office fixtures and supplies, books, salaries and other necessary expenses, the same to be approved by the chairman of said commission and audited by the proper accounting officers of the Treasury.

SEC. 3. That pending the report of the commission herein provided for and for a period of thirty days thereafter the compensation of railway employees subject to this Act for a standard eight-hour workday shall not be reduced below the present standard day's wage; and for all necessary time in excess of eight hours such employees shall be paid

at a rate not less than the pro rata rate for such standard eight-hour workday.

SEC. 4 That any person violating any provision of this Act shall be guilty of a misdemeanor and upon conviction shall be fined not less than $100 and not more than $1,000, or imprisoned not to exceed one year, or both."

Defendant in error instituted this action in Justice Court, No. 1 Precinct, County of Greenlee, State of Arizona, for the recovery of wages claimed to be due by reason of the alleged failure of the Plaintiff in Error to apply properly said Adamson Act to its wage schedules. In due course, Plaintiff in Error removed the case to the United States District Court for the District of Arizona, at Tucson, Arizona, wherein the cause was submitted to the court upon an Agreed Statement of Facts. (Transcript 7-45).

Judgment was entered in favor of Defendant in Error in the lower court in the sum prayed in the complaint, One Hundred and Fifty and no—100 Dollars, with interest at six per cent per annum until paid and costs taxed at Thirty Dollars with like interest.

Plaintiff in Error owns and operates as a common carrier for hire an interstate railroad, 111.94 miles in length, between Hachita, New Mexico, and Clifton, Arizona. Defendant in error entered the employ of Plaintiff in Error the 6th day of August, 1916, and continued in such employment until the 27th day of April, 1917, and during such period was employed as a brakeman in interstate commerce.

The engineers and firemen, employees of Plaintiff in Error, were members of the Brotherhood of Loco-

motive Engineers and Firemen, and the brakemen and conductors, employees of Plaintiff in Error, were members of the Brotherhood of Railroad Trainmen at all times herein concerned, and during said period of Defendant in Error's employment he was a member of said Brotherhood of Railroad Trainmen.

Effective April 1, 1911, a schedule of wages and a contract of employment were agreed upon between Plaintiff in Error and the conductors and brakemen in the employ of Plaintiff in Error, and the Brotherhood of Trainmen, representing and binding the conductors and brakemen of Plaintiff in Error, (Transcript 9-16), referred to in said transcript as Schedule A, and hereinafter designated as Schedule A.

Plaintiff in Error and its conductors and brakemen operated under this schedule of wages from said first day of April, 1911, until the 7th day of July, 1916.

Under said Schedule "A" Brakemen were paid as follows:

PASSENGER BRAKEMEN: $117.00 per month with overtime at rate of 38 cents per hour to commence one hour after schedule (nine hours); Calender days to constitute a month. Transcript 9).

FREIGHT BRAKEMEN: 42 cents per hour; calendar working days to constitute a month; overtime after ten hours at pro rata rates. This schedule gave an average of 26 working days per month of ten hours per day, or an average of $109.20 for a ten hour day with overtime at rate of 42 cents per hour. (Transcript 10).

On March 29, 1916, the Brotherhood of Railroad Trainmen, comprising Brotherhood of Locomotive Engineers, and the Brotherhood of Trainmen, being national associations of engineers, firemen, conductors and brakemen engaged in railway service in the United States, submitted to the Railroad employers of the United States a schedule of demands in respect to wages based upon the eight-hour day and time-and-one-half overtime principle (Transcript 17-19), said demands being referred to in said transcript as Schedule B, and herein referred to as Schedule B.

Inasmuch as practically all railroads in the United States operated on the ten hour a day basis the advance in wages proposed by Schedule "B" was approximately 20 per cent, substituting the same pay for eight hours work as formerly paid for ten hours.

The locomotive engineers, firemen and trainmen of Plaintiff in Error and in particular the Defendant in Error, were at all times herein concerned, members of said Brotherhood of Railroad Trainmen.

During the month of June, 1916, at which time were then pending negotiations between railway employers of the United States and said Brotherhood of Railroad Trainmen, upon demands set forth in Schedule B, the trainmen, employees of Plaintiff in Error, submitted for the consideration of Plaintiff in Error, a proposed new wage schedule upon the eight-hour and time-and-one-half overtime basis, among which schedules and demands was one made on behalf of the conductors and brakemen of Plaintiff in Error, which said demands were tantamount

to and in conformity with said demands made by the Brotherhood of Trainmen upon the railroad employers of the United States, set forth in said Schedule B (Transcript 19-27), which said proposed schedule presented by the conductors and brakemen of Plaintiff in Error is referred to in said transcript as Schedule C, and hereinafter referred to as Schedule C.

Under said Schedule "C" brakemen were to be paid as follows:

PASSENGER BRAKEMEN: $117.00 per month. Eight hours to constitute a day; overtime one and one-half times pro rata; calendar days to constitute a month (Transcript 20).

FREIGHT AND MIXED SERVICE BRAKEMEN: $107.00 per month; 26 days to constitute a month; eight hours to constitute a day; overtime at one and one-half the pro rata rate (Transcript 20).

Under this proposed schedule the average increase in pay would have been:

PASSENGER BRAKEMEN: $3.90 per eight-hour day or 48½ cents per hour, with average overtime of two hours (to cover schedule) or average daily wage of $4.87 or average monthly wage of $146.20 as against $117.00 under Schedule "A" or an increase demand of approximately 25 per cent.

FREIGHT BRAKEMEN: $4.12 per eight-hour day or $0.515 per hour, with average overtime of two hours per day (Schedule "A" being on the ten-hour day basis) or average daily wage of $5.15 or

average monthly wage of $133.90 as against $109.20 under said Schedule "A" or an increase of approximately 22 per cent.

Plaintiff in Error and its railway employees and in particular its conductors and brakemen, were not desirous of entering into the national controversy then in progress between the National Brotherhood of Trainmen, and the railroad employers of the United States, over demands made in said Schedule B, and to that end and for the purpose of compromising and settling the demands of the employees of Plaintiff in Error, and in particular of its conductors and brakemen pending the settlement of said controversy between said National Brotherhoods of Trainmen and Railroad employers of the United States over said Schedule B, entered into and adopted new schedules and contracts of employment among which was that certain schedule and contract between Plaintiff in Error and its conductors and brakemen which was made effective the 16th day of June, 1916 (Transcript 28-36), which said new schedule and contract is referred to as Schedule D in said Transcript and hereinafter referred to as Schedule D.

Under said schedule "D" Brakemen were paid as follows:

PASSENGER BRAKEMEN: $150.00 per calender month; ten hour or less to constitute a day; over time pro rata. (Transcript 28).

This gave an average monthly increase of $3.80 over the demands contained in Schedule "C", but limited overtime after ten hours to pro rata rates;

but the increase in wages granted by this new schedule was approximately 28 per cent over the average wage under Schedule "A", being $150.00 per month as against $117.00 per month.

FREIGHT BRAKEMEN: $136.50 per month of 26 days: ten hours or less to constitute a day: overtime pro rata. (Transcript 28).

This gave an average monthly increase of $2.60 over the demands contained in schedule "C", but limited overtime after ten hours to a pro rata rate: but the increase in wages granted by this new schedule was approximately twenty-five per cent over the average wage under schedule "A", being $136.50 per month as against $109.20 per month.

It was recognized at the time of the execution of said Schedule "D", effective June 16, 1916, by both Plaintiff in Error and its trainmen, that the question of national adoption on the part of the railroad brotherhoods of trainmen and the railway employers of the United States of an eight hour day and time and one-half overtime basis for wages was not settled, and that the question was then an open one likely to be determined either by adoption or by rejection or by compromise, and inasmuch as the trainmen and employees of Plaintiff in Error were members of and affiliated with the National Brotherhood of Trainmen, in the event the eight hour day, and time and one-half overtime basis of wage schedule was either adopted or a compromise effected thereon, a further adjustment of wages would be necessary between Plaintiff in Error and its trainmen upon said Schedule "D", in conformity with the agreement so reached between said National Broth-

erhood of Trainmen and said railroad employers of the United States, and recognizing this contingency an express written agreement was executed betwee Plaintiff in Error and its trainmen in words and figures as follows, to-wit:

"AGREEMENT BETWEEN THE TRAIN AND ENGINE MEN OF THE ARIZONA AND NEW MEXICO RAILWAY COMPANY AND THE ENGINE MEN OF THE COLORADO RAILROAD.

In signing up the agreement between the Train and Engine men which is effective under date of June 16, 1916, it is mutually agreed between the parties to this agreement namely: The Arizona & New Mexico Railway Company, The Coronado Railroad, the Engine men of the Coronado Railroad and the Train and Engine Employees of The Arizona & New Mexico Railway, that in case, in the future, the employees ask for a new schedule based on either an eight-hour day or time and one-half for overtime, or both of these provisions, that the new schedule under date of June 16th, 1916, will not be used as a basis on which to figure out rates of pay or working conditions, and that for the purpose of figuring a schedule under such eight-hour day or time an one-half for overtime, this schedule of June 16th, 1916, will not be considered as having been in effect.

(Signed) THEO. M. KLINE,
For the Engineers.

(Signed) FRANK THOMAS,
For the Firemen.

(Signed) W. E. MITCHELL,
For the Trainmen.

(Signed) P. REISINGER,
For the Arizona and New Mexico Ry. and the Coronado Railway.

Clifton, Arizona, July 7th, Nineteen Sixteen."

(Transcript 37-38.) Said supplemental agreement is referred to in said Transcript as Schedule E and is hereinafter referred to as Supplemental Agreement.

The new schedule, under date June 16, 1916, referred to in said Supplemental Agreement, is the agreement herein mentioned as Schedule D.

From the 6th day of August, 1916, the date on which Defendant in Error entered the employ of Plaintiff in Error, to and including the 31st day of December, 1916, Defendant in Error was paid and receipted for in full for all services performed by him under the provisions of said Schedule D, being the new contract and schedule effective June 16, 1916.

Approved September 3, 5, 1916, the Adamson Act was passed. This act in effect provided that following the first day of January, 1917 eight hours should be deemed a day's work in railroad wage contracts, with overtime after the eight hours at pro rata rates. This act substituted the same pay for eight hours as was provided to be paid under the then existing wage schedules for the number of hours therein constituted as a day's work; or in as much as approximately all of the railroads in the United States were on the ten hour a day basis, the Act provided that the same

pay should be given for Eight Hours work as was provided by the then existing schedules to be paid for ten hours with overtime after the eight hours at pro rata rates; or the Adamson Act achieved for the railway employees affected thereby a twenty per cent increase in wages with overtime pro rata.

(Adamson Act quoted herein at page 5).

Applying the Adamson Act as contended for by Defendant in Error, that is to Schedule "D", the Average earnings of Brakemen would have been as follows:

PASSENGER BRAKEMEN: $150.00 per calender month; eight hours or less to constitute a day; overtime pro rata. On the basis of ten hours work, under this application of Adamson Act, such brakeman would have earned $6.00 per day or $180.00 per calender month, an increase of twenty per cent over Schedule "D"; an increase of $33.50 per month over and above the demands proposed in Schedule "C" or an increase of over 23 per cent ($180.00 per month as against $146.50 per month); an increase of $63.00 per month over and above the wages provided in Schedule "A", or an increase of over 53 per cent ($180.00 per month as against $117.00 per month).

FREIGHT BRAKEMEN: $136.50 per month; twenty six days to constitute a month; eight hours or less to constitute a day; over time pro rata. On the basis of ten hours work, under this application of the Adamson Act, such brakeman would have earned $6.30 per day or $163.80 per month of 26 days, an increase of 20 per cent over Schedule "D"; an increase of $30.68 per month over and above the de-

mands proposed in Schedule "C", or an increase of over 23 per cent $163.80 per month as against $133.12 per month); an increase of $54.60 per month over and above the wages provided by Schedule "A", or an increase of 50 per cent ($163.80 per month as against $109.20 per month).

Subsequent to the passage of the Adamson Act the train employees of Plaintiff in Error, including Defendant in Error, insisted that they be paid upon the basis of the application of the Adamson Act to Schedule D, the new contract and schedule adopted in July, and made effective as of June 16, 1916, and that they be paid under said Schedule D on an eight-hour basis with overtime in excess of eight hours at the same rate.

This, Plaintiff in Error declined to do and thereafter at all times paid such employees, including Defendant in Error, for all train service, compensation computed on the basis of the application of the Adamson Act to the compensation provided in Schedule A, the old schedule in effect from 1911 until June 16, 1916, except in such cases where by using the provisions of Schedule D, the new schedule and contract, effective June 16, 1916, without applying the Adamson Act, a greater compensation would result, in which cases the compensation was computed and payment made in accordance with Schedule D without applying the Adamson Act (Transcript 39).

This action of Defendant in Error was predicated in the lower Court and judgment therein found in his favor upon the theory that Schedule "D," the new or temporary and conditional sched-

ule, effective June 16th, 1916, afforded the "present standard day's wage" within the meaning of Section 3 of the Adamson Law, at the time such law became operative, and that during the control period provided in said Section 3 of the Act, Plaintiff in Error was legally required to pay Defendant in Error upon the basis of said Schedule "D" with the Adamson Law applied thereto, which is in effect, by virtue of the legislation, so to alter the provisions of said Schedule "D," that it afford the same compensation for eight hours of work as therein provided for ten hours of work, with overtime above the eight hours pro rata—an increase by virtue of such application of the legislation of twenty per cent in wages over and above the wages secured under the provisions of the schedule as previously established by the voluntary agreement of the parties as according the monetary effect of the National demands, as set forth in Schedule "B" and of the demands of the trainmen of Plaintiff in Error concomitant with such National demands, as set forth in Schedule "C."

Plaintiff in Error refused to accept this theory as its legal obligation under the facts, and contends:

First: If, under the facts, the Adamson Law was applicable to it the law was legally applicable to Schedule "A."

Second: If, under the facts, the Adamson Law was not applicable to it, the full legal duty, in respect to wages and hours of service, of Plaintiff in Error to its trainmen and in particular to Defend-

ant in Error, was discharged, during the control period named in the Act, by the observance and performance on its part of the provisions of Schedule "D."

The amounts that would have been earned by and due to Defendant in Error for the period in controversy, under the various theories of the case, herein concerned are as follows:

A.

PAYMENTS IN FACT MADE TO AND RESEIVED BY DEFENDANT IN ERROR DURING THE PERIOD IN CONTROVERSY:

Earned and paid under Schedule "A" with Adamson Act applied thereto:

As Freight Brakeman 1075–36/60 hrs. at 52½ per hr.	$564.72
As Passenger Brakeman 18–40/60 hrs. at 47.175c per hr.	8.80
Total	$573.52
Paid in addition under Schedule "D" as provided in paragraph 15 herein the sum of	72.23
Grand Total	$645.75

(Transcript 44.)

B.

SCHEDULE "A" WITH ADAMSON ACT APPLIED THERETO:

If under the facts it was the duty of Plaintiff in

Error to pay under Schedule "A" with Adamson Act applied thereto, Defendant in Error would have earned and have been entitled to receive for such services as follows:

As Freight Brakeman 1075–35/60 hrs. at 52½c per hr.	$564.72
As Passenger Brakeman 18–40/60 hrs. at 47.175 per hr.	8.80
Total	$573.52

(Transcript 44.)

C.

SCHEDULE "D" *WITH* THE ADAMSON ACT APPLIED THERETO:

If under the facts it was the duty of Plaintiff in Error to pay under Schedule "D" with Adamson Act applied thereto, Defendant in Error would have earned and would have been entitled to receive for such services as follows:

As Freight Brakeman 1075–36/60 hrs. at 65.625c per hr.	$705.85
As Passenger Brakeman 18–40/60 hrs. at 62.5 per hr.	11.67
Total	$717.52

(Transcript 44-45.)

SCHEDULE "D" *WITHOUT* THE ADAMSON ACT APPLIED:

If under the facts it was the duty of Plaintiff in

Error to pay under Schedule "D," Defendant in Error would have earned and would have been entitled to receive for such services as follows:

As Freight Brakeman 1210–12/60 hrs. at 52.5c per hr.	$635.40
As Pass'gr Brakeman 20–40/60 hrs. at 50 cents per hr.	10.35
Total	$645.75

(Transcript 45.)

SPECIFICATION OF ERRORS

I.

The trial court erred in rendering and entering judgment in favor of the Defendant in Error and against the Plaintiff in Error in the sum of One Hundred Fifty (150) Dollars, said sum being in excess of the sum of Seventy-one 20/100 ($71.20) Dollars, the amount specified in the agreed statement of facts as the amount to which the Defendant in Error was entitled in the event judgment should be granted in his favor.

II.

That the trial court erred in rendering and entering judgment in favor of Defendant in Error and against the Plaintiff in Error in the sum of One Hundred Fifty (150) Dollars, interest and costs, or at all, for the reasons:

(a) That the temporary agreement, Schedule "D," [45] set forth in the agreed statement of facts, by its very terms was not an agreement in

force or effect either at the date of the passage or the effective date of the Adamson Act, being the Act of September 3 and 5, 1916, Chapter 463, entitled "An Act to establish an eight-hour day for employees of carriers engaged in interstate and foreign commerce and for other purposes," but, upon the contrary, the agreement then and thereafter in force was that set forth in Schedule "A" in said agreed statement of facts.

(b) That the judgment of said Court proceeded upon an erroneous construction of the said Adamson Act in this, that said Act contemplated the application of the standard eight-hour day to contracts in being at the date of the passage or effective date of the said Act which, under the agreed statement of facts, is the agreement set forth in Schedule "A" therein, whereas the agreement, Schedule "D" to which the trial court applied said Act, was in fact a *modus vivendi* pending the settlement of the controversy between the Railroad Brotherhoods and the Railway Managers throughout the United States and which controversy was determined by the passage of the said Adamson Act; all of which fully appears in the agreed statement of facts.

III.

That the Court erred in entering judgment in favor of the Defendant in Error and against Plaintiff in Error for the reason that the Plaintiff in Error in paying its employees, and particularly Defendant in Error, on the basis of Schedule "A" with the Adamson Act applied thereto, and not upon Schedule "D," with the Adamson Act applied thereto, as was determined by the trial court to be

its duty to do, did not thereby reduce the compensation of Defendant in Error below the standard day's wage in effect either at the passage of the Adamson Act or its effective date and that the standard day's wage in effect at passage or on effective date of said Adamson Act was that provided by said Schedule "A."

ARGUMENT

SPECIFICATION OF ERROR I.

The amount of the judgment is obviously erroneous upon the stipulations of the Agreed Statement of Facts.

From January 1st, 1917, to April 27th, 1917, the period in dispute, Defendant in Error was paid by Plaintiff in Error the sum of $645.75. (Transcript 39-42).

Assuming the correctness of the contention of Defendant in Error that during this period he should have been paid on the basis of the application of the Adamson Act to Schedule "D", his earnings upon this disputed theory would have been $717.52. (Transcript 45) Upon the Agreed Statement of Facts the most in any event the Defendant in Error could be entitled to is the difference between the amount paid and the amount so claimed, or the sum of $71.20.

SPECIFICATIONS OF ERRORS II AND III.

FIRST PROPOSITION

PLAINTIFF IN ERROR AND ITS TRAIN EMPLOYEES WERE NEVER PARTIES TO THE DISPUTE THAT GAVE RISE TO THE PASSAGE OF THE ADAMSON ACT; AND FOR THE EX-

PRESS PURPOSE OF AVOIDING PARTICIPATION THEREIN SETTLED BETWEEN THEMSELVES THIS DISPUTE BY SETTING UP A NEW SCHEDULE WHICH SECURED TO THE TRAIN EMPLOYEES ADVANCES IN WAGES, FIRST, TANTAMOUNT TO THE ADVANCES CONTENDED FOR AND RESISTED IN THE NATIONAL CONTROVERSY, AND SECOND, IN EXCESS OF INCREASES THAT WOULD OTHERWISE HAVE BEEN SECURED BY THE APPLICATION OF THE ADAMSON ACT, HAD PLAINTIFF IN ERROR AND ITS TRAINMEN JOINED THE NATIONAL CONTROVERSY AND WITHOUT AGREEMENT ABIDED THE RESULT OF THAT CONTROVERSY.

As fully appears from the statement of the case, when the national controversy arose between the railroad employers of the United States and the Brotherhood of Railroad Trainmen, wherein the latter were demanding that the compensation of trainmen be based upon the eight-hour and time and one-half overtime principle, Plaintiff in Error and its trainmen were operating under a schedule or contract for wages which had been in amicable existence from the year 1911 and continued so to operate until in July of 1916, when the national controversy was still in the process of negotiation. Although the train employees of Plaintiff in Error were members of brotherhoods affiliated with the Brotherhood of Railroad Trainmen and Plaintiff in Error was a railroad employer and, as such, were entitled to participate in the national controversy, neither Plaintiff in Error nor its trainmen were desirous of involving themselves in the dispute. In

conformity with the demands of the Brotherhood of Railroad Trainmen in the national controversy, the trainmen of Plaintiff in Error presented a proposed schedule and contract for wages which were tantamount to the demands made nationally, and were based upon the eight-hour and time and one-half overtime principle; and as a compromise, and as a solution of such demands so made, Plaintiff in Error and its trainmen amicably agreed to a new schedule or contract for wages (Schedule D) securing to passenger brakemen an advance of approximately 28% and to freight brakemen an advance of approximately 25% over and above the wages secured by the provisions of the then existing schedule (Schedule A). In forming the new schedule there was laid aside insistence on the application of the principle of the eight-hour day and time and one-half overtime. This was a natural conclusion for the reason that then the adoption of the eight-hour and time and one-half overtime principle nationally had not been determined, and inasmuch as the trainmen of Plaintiff in Error were affiliated with the National Brotherhood of Railroad Trainmen, they would be desirous of following on their part as affiliated members of such national brotherhood whatever final agreement it reached with the railroad employers in the United States. However, it would appear that the demands for time and one-half overtime were not entirely disregarded in the fixation of the new rates of wages inasmuch as the schedule proposed by the trainmen (Schedule C) and based upon the principle of the eight-hour day and time and one-half overtime proposed an increase for passenger brakemen of 25% over the old schedule (Schedule A) as against the increase of

28% over the old schedule granted by the new schedule (Schedule D); and for freight brakemen proposed an increase of 22% as against the granted increase in the new schedule of 25% over the old schedule, or Schedule "A."

In recognition of the eventuality that the eight-hour day and time and one-half overtime principle might be adopted nationally, and that the new schedule, made retroactively effective to the 16th day of June, 1916, was but a *modus vivendi* pending the settlement of the national controversy, Plaintiff in Error and its trainmen entered into an express written agreement, supplemental to the new schedule (Schedule "D"), quoted in the statement of the case at page 14 herein. Plainly the effect of this agreement was that in the event Plaintiff in Error and its railroad trainmen determined to base railroad compensation upon the eight-hour day and time and one-half overtime principle, the new schedule (Schedule D) should not be taken as the basis for the application of that principle, and should not be considered as having been in existence, thereby reviving the immediately pre-existing schedule, or Schedule "A." Obviously, from an examination of the national demand (Schedule B), all that was sought to be accomplished thereby was the payment, for eight hours of work, of that sum which was then paid under existing schedules and contracts for a day's work as thereby constituted with time and one-half for overtime above the eight hours; and just as obviously, the trainmen of Plaintiff in Error, although not securing an eight-hour day or time and one-half for overtime, did obtain in an actual advance of wages, on the basis of a ten-hour day and pro rata overtime, considerably

in excess of what would have been the wage increase secured by the simple application of the eight-hour day and time and one-half overtime principle to the old schedule (Schedule A) ;and just as obviously, at the time of the negotiation of the new schedule (Schedule D) it appeared equitable and just to both sides, the Plaintiff in Error and its trainmen, that, inasmuch as all the monetary advantage which would be achieved by the application of the eight-hour day and time and one-half overtime principle had been achieved without recognition of the principle, in the event the principle were recognized and to be applied, it should not be applied to the schedule or contract which already secured the monetary advantage resulting from the application of the principle; and to save any future misunderstanding, upon this point, the agreement contained in the supplemental agreement (Schedule E) was reduced to writing and executed.

Of course at the time the new schedule (Schedule D) was negotiated, and at the time the supplemental agreement was executed and the understanding, therein, expressed, had between Plaintiff in Error and its trainmen, the enactment of any such law as the Adamson Act had never been thought of, and was entirely beyond any reasonable contemplation of the parties.

What was contemplated, and within the reasonable anticipation of the paries, was the eventuality of the national adoption by agreement of the eight hour day and time and one-half overtime principle. The actual development was that the national brotherhoods and the railroad employers of the United

States were unable to agree upon the solution of the controversy involving this principle and to prevent a threatened general strike an tie-up of all the railroads in the United States concerned in the controversy and to safeguard against a disastrous, nationwide paralysis of industry, Congress enacted the Adamson Act, which recognized the eight hour, but not the time and one-half overtime principle. So, by unexpected legislation and development, as far as these parties were concerned, there was substituted for the probable and contemplated national agreement in recognition of the eight hour principle, the legislative recognition and application of such principle. In justice between these parties the Plaintiff in Error should have every benefit from the plain provision and intendment of the supplemental agreement, notwithstanding that the application of the eight hour principle came about through legislative interference rather than by contractual agreement between the parties.

Section 3 of the Adamson Act provides:

> "Sec. 3. That pending the report of the commission herein provided for and for a period of thirty days thereafter, the compensation of railroad employees subject to this act for a standard eight hour workday shall not be reduced below the present standard day's wage, and for all necessary time in excess of eight hours such employees shall be paid at a rate not less than the pro rata rate for such standard eight hour workday."

The purpose of this section was obviously twofold: first to secure to the trainmen of the United

States the application of the eight hour day; but to what? To the schedules and contracts for railroad compensation which were in effect *and out of which the controversy which gave birth to the Adamson Act arose.* Second, to afford to the Commission appointed for the purpose of investigating the effect of the act upon railroad conditions, a stable and unchanging, quiescent period in which to make such observation. But in the light of what circumstances and conditions was it the contemplation of the act this investigation by such commission should be made? Clearly, if an investigation were to be made by the commission as to the effect on railroad conditions of the application of the Adamson Act, it could be the only intendment of the act, and such investigation could be of informative value and the orientation of the data thereby secured of service in determining the advantages or disadvantages of the operation or continued operation of the Adamson Act, only in the event such investigation was had and the data thereon compiled from an application of the Adamson Act to those schedules and wage contracts then in existence between the railroad employers and the tarinmen of the United States and *out of which the controversy arose.* It was the conditions in existence, the schedules and contracts providing for railroad wages extant at the time of the presentation of the national demands in March, 1916, that gave rise to such demands and the desire on the part of the railroad trainmen to secure application of the eight hour principle, and it was in consideration of the existence of such circumstance and of such schedules and wage agreements that Congress determined to secure, temporarily at least, to these trainmen the application of this principle and

to afford opportunity to an appropriate Commission to observe the advantages or disadvantages flowing from such action. And, to insure an orderly observation of the effect of the application of the law to those conditions, Congress provided that the condition during the period of observation should not be changed. And it follows from this evident intendment and purpose of the act that it is but a reasonable further construction of the law and its intendment that it was not to be applied to any abnormal or temporary situation arisen by reason of any peculiar relation between railroad employer and employee and not of the standard conditions out of which the controversy which led to the enactment of the Adamson law arose. The law was enacted hurriedly to avoid an apparent and imminent national calamity and for the purpose of arranging and providing for a general condition and not for special conditions that might by chance be in existence and arisen individually between employers and employees and out of circumstances and conditions not at all connected with those giving rise to the necessity of the enactment of the Adamson law. There was nothing to be gained by the observance of the effect of the application of the Adamson law to the new or temporary schedule "D" between Plaintiff in Error and its trainmen, which schedule and agreement sought prior to the enactment of the Adamson act to cure between Plaintiff in Error and its trainmen the very conditions that the Adamson Act pretended to meet. There would be every reason for the purpose of establishing justice between the parties to observe the effect of the application of the Adamson Act to those conditions in existence at the time of the passage of the Act and out of which the contro-

versy which gave rise to the necessity for the law arose, which in the instant case would be the application of the Adamson Act to the old schedule, or Schedule "A".

Assume that Plaintiff in Error during the Congressional storms of the month of August, 1916, had developed a penchant for weird legislative prescience, and before its enactment had forecast the Adamson Law, and in a deliberate attempt to exempt itself before hand from the onerous burdens of the act, arbitrarily placed in effect between itself and its trainmen a 30 per cent reduction in wages, and so manipulated the situation, that such reduced schedule was in effect at the time of either the date of approval of the act or at the date it became effective. And assume that this plaintiff in Error were now before this Court contending that such arbitrarily reduced schedule constituted "present standard day's wage" within the meaning of the act. It is to be imagined that the Court would make short shift of the matter, and in so doing would hold that it was the wage schedules, a part of, pertinent and relevant to the conditions out of which the controversy arose and which necessitated the enactment of the Adamson Law that were within the eye of the act and would apply the law to those schedules which gave rise to the demands for the eight-hour day and time and one-half over time principle and upon which the reduction had been practiced.

As set forth in the statement of facts, the effect of granting the national demand for the eight hour day would have been a wage increase of twenty per cent over the conditions existing at the time such demand was made, and against this Plaintiff in Error

in a voluntary agreement with its trainmen granted increases, in particular to its brakemen, of from 25% to 28% over wage contracts then existing. If, on top of these increases, so granted, it were determined to apply the Adamson Act to the new and temporary schedule, (Schedule D), in th ecase of passenger brakemen the resulting compensation would be 20% above that provided by schedule D, 23% above the demands proposed by the trainmen of Plaintiff in Error in schedule C, and 53% above the wages provided to be paid by schedule A, which was of the conditions out of which the controversy arose; and in case of freight brakemen, the increase secured over schedule D would be 20%, an increase of 23% over the schedule proposed by the trainmen in schedule C, and over 50% above the wages provided under schedule "A", of the conditions out of which the controversy arose.

These considerations lead irrefutably to the

SECOND PROPOSITION

AT THE TIME THE NEW SCHEDULE, EFFECTIVE JUNE 16TH, 1916, WAS SET UP, PENDING THE SETTLEMENT OF THE NATIONAL CONTROVERSY, IT WAS THE UNDERSTANDING AND AGREEMENT BETWEEN PLAINTIFF IN ERROR AND ITS TRAINMEN, THAT THIS NEW SCHEDULE WAS IN ITS NATURE AND WITHIN THE CONTEMPLATION OF THE PARTIES, TEMPORARY, A *MODUS VIVENDI,* PENDING THE OUTCOME OF THE NATIONAL CONTROVERSY, AND THAT IN THE EVENT THE RESULT OF THAT CONTROVERSY

WAS TO ESTABLISH NATIONALLY THE EIGHT-HOUR DAY AND TIME AND ONE-HALF OVERTIME PRINCIPLE AS A BASIS FOR RAILWAY TRAINMEN COMPENSATION, A FURTHER ADJUSTMENT BETWEEN PLAINTIFF IN ERROR AND ITS TRAINMEN WOULD BE REQUIRED, AND IN RECOGNITION OF SUCH CONTINGENCY, IT WAS AGREED THAT IN THE EVENT THE EIGHT-HOUR DAY OR TIME AND ONE-HALF OVERTIME PRINCIPLE WAS TO BE APPLIED TO PLAINTIFF IN ERROR AND ITS TRAINMEN, THE NEW SCHEDULE "D" SHOULD NOT BE TAKEN AS THE BASIS FOR THE APPLICATION OF THAT PRINCIPLE AND SUCH SCHEDULE "D" IN SUCH EVENT DEEMED NEVER TO HAVE BEEN IN EXISTENCE. AN ENFORCED APPLICATION OF THE ADAMSON ACT NOT GIVING VALIDITY AND EFFECT TO THIS AGREEMENT IS AN APPLICATION INCONSISTENT WITH THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In this connection reference is made to the case of FORT SMITH AND WESTERN RAILROAD COMPANY et al. vs. MILLS, 253 U. S. 206; 64 L. Ed. 862.

In this case the appellant Railroad Company, in the hands of a receiver, subsequent to the passage of the Adamson Act, made an agreement with its trainmen as to hours of service and wages more advantageous to the Company than the terms of the Act. The district attorney threatened prosecution unless the receiver substituted the more oner-

ous terms of the act for the agreement made with the men, and a bill in equity was brought to enjoin the receiver from conforming to the Act. Here were present the elements of financial difficulties, probable inability of the Company to continue operation under the severe terms of the Act, and the willingness of the trainmen to abide by their agreement. But the decision of the Court is helpful in reaching a solution of the instant case in holding, that in maintaining the purpose, spirit and intendment of the Adamson Act, *it is not required, in spite of the universal language of the Act, that it be construed to reach literally every carrier by railroad subject to the Act to Regulate Commerce.*

We quote liberally from the opinion of the Court:

"The Act in question, known as the Adamson Law, was passed to meet the emergency created by the threat of a general railroad strike.

"In Wilson v. New, 243 U. S. 332; 61 L. Ed. 755 . . . it was decided that the Act was within the constitutional power of Congress to regulate commerce. . . . . But the bill in Wilson v. New raised only the general objections to the Act that were common to every railroad. In that case it was not necessary to consider to what extremes the law might be carried or what were its constitutional limits. It was not decided, for instance, that Congress could or did require a railroad to continue business at a loss. . . . *It was not decided that there might not be circumstances to which the Act could not be applied consistently with the Fifth Amendment, or that the Act, in spite of its universal language, must be construed to reach literally*

every carrier by railroad subject to the Act to Regulate Commerce. It is true that the first section of the statute purports to apply to any such carrier, and the third to the compensation of railway employees subject to the Act. *But the Statute avowedly was enacted in haste to meet an emergency, and the general language necessary to satisfy the demands of the men need not be taken to go further than the emergency required, or to have been intended to make trouble rather than allay it.* We cannot suppose that it was meant to forbid work being done at a less price than the rates laid down, when both parties to the bargain wished to go on as before, and when the circumstances of the road were so exceptional that the lower compensation accepted would not affect the market for labor on other roads.

"But that is the present case. . . . . We must accept the allegations of the bill, and must assume that the men were not merely negatively refraining from demands under the Act, but, presumably appreciating the situation, desired to keep on as they were. *To break up such a bargain would be at least unjust and impolitic, and not at all within the ends the Adamson law had in view. We think it reasonable to assume that the circumstances in which, and the purposes for which, the law was passed, import an exception in this case.*"

In the case at bar, in June, 1916, the trainmen of Plaintiff in Error made upon it certain demands in general conformity to the demands made by the National Brotherhoods upon the railroads generally, based fundamentally upon the proposition of

an eight-hour day and time and one-half overtime. These demands were adjusted in July of 1916 by the agreement on the part of Plaintiff in Error to increase the pay of its trainmen approximately 20 per cent, in the particular of its brakemen from 25 to 28 per cent upon a ten-hour day and pro rata overtime basis, upon which basis operation had theretofore been carried on. This new wage schedule was made effective retroactively, as of June 16th, 1916. And it is to be borne in mind that this settlement and this advance in wages was agreed upon, at that time, for the express purpose of each party avoiding joining the national controversy, out of which the necessity of the enactment of the Adamson Act arose (Agreed Statement of Facts; Transcript 27).

At the time this new schedule was agreed upon (July 1916) the controversy between the National Brotherhoods (with which the employees of Plaintiff in Error were affiliated), and the railroads generally had not been settled, and it was recognized by Plaintiff in Error and its trainmen that if the Brotherhoods succeeded in having the eight-hour day and time and one-half overtime principle adopted as the basis of railroad compensation, in fairness to Plaintiff in Error, which had yielded so much to its trainmen in the new schedule effective June 16th, 1916, and by which an average compensation higher than that then demanded was accorded, although the principle of the eight-hour day and time and one-half overtime was not recognized. Accordingly the supplemental agreement was entered into, stipulating that in the event the principle of the eight-hour day and time and one-half overtime was applied to the

Plaintiff in Error, the new schedule should not be used as the basis of establishing the compensation upon that principle, from which follows the

THIRD PROPOSITION

THE TEMPORARY, CONDITIONAL SCHEDULE, SCHEDULE "D", EFFECTIVE JUNE 16th, 1916, DURING THE PENDENCY OF THE NATIONAL CONTROVERSY, AND PRIOR TO THE ENACTMENT OF THE ADAMSON LAW, AND FOR THE PURPOSE OF AVOIDING PARTICIPATION IN THE NATIONAL CONTROVERSY, AND AS A VOLUNTARY AND AMICABLE SETTLEMENT OF THE DEMANDS OF SAID TRAINMEN, MADE PURSUANT AND TANTAMOUNT TO SAID NATIONAL CONTROVERSY, DID NOT AFFORD THE "PRESENT STANDARD DAY'S WAGE" WITHIN THE MEANING OF SECTION 3 OF THE ADAMSON LAW.

If as contended for by Defendant in Error and as ruled by the learned lower court, the schedule of wages temporarily and conditionally established in Schedule "D", effective June 16th, 1916, by the voluntary agreement of Plaintiff in Error and its trainmen for the purpose of avoidance of participaiton in the National Controversy, is to be taken as "the present standard day's wage" within the meaning of Section 3 of the Adamson Act (despite the Supplemental agreement that it should not be so taken if an eight-hour day were subsequently established), the result will be that Plaintiff in Error, which, prior to the enactment of the Adamson Act, had settled its dispute with its trainmen by granting them increases tantamount to those caused subsequently by the Adamson Act, will be compelled to grant such trainmen, *because of that very fact*, still further increases.

In other words, whereas the railroads generally which caused the enactment of the Adamson Law, failing to come to an agreement with their employees, escape with the penalty of the 20 per cent increase provided by the act, Plaintiff in Error, which was involved in no dispute with its employees at the time of the passage of the Law, but which on the contrary, had adjusted its differences with its employees, will be mulcted to the extent of 50 to 53 per cent increase in the wages of its employees and in particular of its brakemen; and this northwithstanding the fact, that said employees had, *prior to the enactment of the Adamson Law,* expressly agreed that, in fairness to Plaintiff in Error, in the event the eight-hour day and time and one-half overtime principle were applied to Plaintiff in Error the new schedule would not be used as the basis for the application of the principle, and in that event would "not be considered as having been in effect" (Concluding provision of the Supplemental agreement) which plainly meant, that such principle should be applied to the previous schedule, Schedule "A", the schedule in effect at the time the controversy arose.

Assume Plaintiff in Error had stood its ground in July, 1916, and insisted on awaiting the outcome of the National controversy, as it could have done by entering the same in active participation, thereby forcing such entrance upon the part of its trainmen. The result would have been that Plaintiff in Error and its trainmen would have continued to operate under the old schedule, schedule "A", and would have been so operating at the date of the passage of the Adamson Law and upon the first day of January, 1917. Under such circumstances without the

possibility of controversy the pay of the trainmen of Plaintiff in Error would have been that resulting from the application of the Adamson Law to the Old Schedule "A". Under such condition the trainmen of Plaintiff in Error would have lost the benefits of the increases secured under the new schedule from June 16th, 1916, to the first of January, 1917, and during the entire limiting control of the Adamson Act would have lost the same benefits, in as much as Plaintiff in Error, although it insisted that it was required to apply the Adamson Act not to Schedule "D" the new schedule, but to Schedule "A" the old Schedule, voluntarily assumed the burden of wage payments under schedule "D", without the Adamson Law applied, where the earnings of the trainmen thereunder were in excess of earnings under schedule "A" with the Adamson Act applied. (Agreed Statement of Facts; Transcript XV-39) By reason of this concession on the part of Plaintiff in Error, Defendant in Error was paid for his services during the period in controversy the sum of $645.75 as against the sum of $573.52 earned under Schedule "A" with the Adamson Law applied. (Transcript 44).

As a result of this voluntary settlement in July, 1916, the trainmen of Plaintiff in Error, had the advantage and more of the Adamson Law for six and one-half months before it became operative for the train employees of the railroads in general in the United States; and now Defendant in Error in utter unfairness to Plaintiff in Error seeks to double his advantages by an act of duplicity by in effect applying the Adamson Law upon itself twice over, and appears in the ungenerous position of attempting to eat his cake and keep it.

Manifestly a construction of the statute which would work such gross injustice and absurdities should be avoided. As far as monetary considerations are concerned Plaintiff in Error in agreeing to the new schedule more than anticipated the Adamson Law, and to enforce an application of that law upon the new schedule is no more reasonable than would be a construction of the Safety Appliance Act, whereby a railroad, which prior to enactment or effectiveness of that Law installed all such appliances so required, would be compelled subsequently thereto to remove and re-install such safety devices.

By virtue of the several agreements between Plaintiff in Error and its trainmen herein considered, Plaintiff in Error had so adjusted its differences with them that there was thereafter no danger of a strike on their part and a consequent interruption of interstate commerce, because, not only had Plaintiff in Error granted its trainmen increases equal to what they would have received on the eight-hour day basis, but had provided by the supplemental agreement, for the contingency of an eight-hour day being established, that in that event the new conditional and temporary schedule "D" should be ignored and wages then adjusted with reference to the pre-existing schedules.

As stated over and over again by Chief Justice White, in delivering the majority opinion in Wilson v. New (supra) upholding the Adamson Law, the reason for the passage of that law and the justification for such exercise of power by Congress under the Constitution, was the fact that the railroads had failed to exercise their primary right to fix wages by agreement with their employees and the

consequent interruption of interstate commerce that was threatened. Thus at the outset of his discussion of the constitutionality of the law, the Chief Justice said:

> " . . . Concretely stated, therefore, the question is this: Did Congress have power *under the circumstances stated, that is, in dealing with the dispute between the employees and employers as to wages,* to provide a permanent eight-hour standard and to create by legislative action a standard of wages to be operative upon the employers and employees for such reasonable time as it deemed necessary to afford an opportunity for the meeting of the minds of employers and employees on the subject of wages? Or, in other words, did it have the power *in order to prevent the interruption of interstate commerce* to exert its will to supply the absence of a wage scale resulting from the disagreement as to wages between the employers and employees and to make its will on that subject controlling for the limited period provided for?"

And in discussing the question Chief Justice White said:

> "It is also equally true that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed on standard is not subject to be controlled or prevented by public authority. But taking all these propositions as undoubted, if the situation which we

> have described and with which the Act of Congress dealt be taken into view, that of wages, their failure to agree, the resulting absence of such standard, the entire interruption of interstate commerce which was threatened, and the infinite injury to the public interest which was imminent, it would seem inevitably to result that the power to regulate necessarily obtained and was subject to be applied to the extent necessary to provide a remedy for the situation, which included the power to deal with the dispute, to provide by appropriate action for a standard of wages to fill the want of one caused by the failure to exert the private right on the subject and to give effect by appropriate legislation to the regulations thus adopted."

Thus the constitutionality of the action of Congress in the regulation created by the Adamson Law was fundamentally justified upon the ground that private interests had failed to exert the private right to establish mutually satisfactory standards of wages. In the instant case Plaintiff in Error and its trainmen had fully, completely and with mutual satisfaction exercised that private right, established a standard of wages satisfactory to each, and were peacefully operating thereunder at the time of the enactment of the Adamson Law.

Again the Chief Justice said:

> "It follows that the very absence of the scale of wages by agreement and the impediment and destruction of interstate commerce which was threatened, called for the appropriate and relevant remedy, the creation of a standard by operation of law binding upon the carrier"

Manifestly, Plaintiff in Error did not come within the class of carriers referred to by the Court. It had, with its employees, "a scale of wages fixed by agreement," and with respect to it, no interruption of interstate commerce was threatened. So far as Plaintiff in Error was concerned there was no necessity for the Adamson Law and no constitutional basis for the exercise by Congress of the power embodied in the law—*no ground for the deprivation by Congress of what the Court recognized as its primary right to fix wages by agreement with its employees.* It would be strange, therefore, if, under such circumstances, this Plaintiff in Error should be *doubly penalized* by the operation of such a law, and made to suffer far beyond those carriers whose failure to reach an agreement with their employees had brought about its enactment.

Section 3 of the Act is in furtherance of the purpose of Congress to avoid an interruption of interstate commerce through strikes on the part of the carriers' trainmen. It aimed to prevent the carriers, during the period of investigation mentioned therein, from making such disturbances by *arbitrarily* reducing the "present standard day's wage," as in that way they could avoid the increase in pay which the statute gave in order to placate their dissatisfied employees.

But in the case of Plaintiff in Error, its employees were not dissatisfied, were not threatening to strike, but, on the contrary, had reached an agreement with Plaintiff in Error with respect to their wages prior to the enactment of the law, and further in the event of the establishment of an eight-

hour day, had expressly agreed that wage schedules theretofore in force should be regarded as operative.

Considering the spirit and purpose of the statute, therefore, there is no reason for disregarding the agreement theretofore made between Plaintiff in Error and its trainmen, as to what should constitute the standard day's wage for the purpose of adjusting their pay on the eight-hour day basis. On the contrary, in all justice and fairness, neither the Government nor the trainmen would be justified, in the face of such prior understanding and agreement, in holding that the schedule effective June 16th, 1916 (Schedule "D"), and which was expressly limited in its duration by said understanding and agreement, should continue in force after the event which was to terminate it had occurred. In the face of said understanding and agreement, and considering the reason and purpose of the law, said conditional schedule, effective June 16th, 1916, cannot be considered the "present standard day's wage," within the meaning of the statute. By virtue of the agreement and the enactment of the Adamson Law, the schedule ceased *ipso facto* to exist and the schedule fixed by the prior contracts of Plaintiff in Error with its employees became operative and framed the "present standard day's wage" for such employees.

It is impossible to conceive how, by any fair construction of the law, in the light of the facts and circumstances surrounding the situation, the conditional schedule, effective June 16th, 1916, Schedule "D" can be said to continue in force, notwithstand-

ing the Supplemental Agreement, and to be the "present standard day's wage" within the meaning of the statute. But even if it could be said to be within the letter of the statute, which we can not admit, it certainly does not come within its purpose. *To hold otherwise would be to cause Plaintiff in Error to suffer for the concessions which it made to its employees in order to prevent the interruption of interstate commerce and to penalize it doubly for making such concessions.* Prior to the enactment of the statute, Plaintiff in Error had granted to its employees substantially all the increases that the statute subsequently gave to the employees of those roads that had not so settled their differences, and the contention now is on the part of Defendant in Error, that, despite the prior understanding and agreement to the contrary with its employees, Plaintiff in Error should have granted still greater increases—more than double that which the recalcitrant roads were called upon to pay.

Statutes, and especially penal statutes, are to be fairly construed, and the spirit of the statute is always considered as of greater importance than the letter, and as throwing light upon the construction to be given to its letter. The case of Holy Trinity Church v. United States, (143 U. S. 457; 36 L. Ed. 226) is in the effect that courts will not apply a penal statute contrary to its spirit and intent, although the case come within its letter.

The rule of strict construction of criminal statutes does not require that the narrowest technical meaning be given to the words employed, in disregard of their context, *and in frustration of the obvious legislative intent.*

U. S. v. Corbet 215 U. S. 233; 54 L. Ed. 173.

The more recent Standard Oil (221 U. S. 1; 55 L. Ed. 619) and Tobacco Company (221 U. S. 142; 55 L. Ed. 663) cases strikingly illustrate the proposition that penal statutes are to be given a reasonable and not an oppressive construction.

The opinion of the lower court in rendering judgment against Plaintiff in Error is based entirely upon the most strict adherence to and construction of the universal language of the statute, and proceeds upon the theory that by "the present standard day's wage" is meant that contract for wages, regardless of every consideration in relation thereto, that by chance was in existence or operative on the date of the effectiveness of the act, but Plaintiff in Error confidently submits upon the whole case and in full consideration of the facts and of the spirit and purpose of the Adamson Law, that the Court will not lend itself to the working of the great hardship and injustice which would be caused Plaintiff in Error by holding that the conditional and temporary Schedule "D" afforded the "present standard day's wage" and the basis of wage payment under application of the Adamson Law, and that following the clear and just reasoning of Justice Holmes in Fort Smith and Western Railroad Company v. Mills (supra) it will be found, that under the circumstances of this case the Adamson Act could not by reason of all these circumstances and conditions and the provisions of the Supplemental Agreement be applied consistently with the fifth amendment to the Constitution of the United States to the conditional and temporary Schedule "D"; that, in spite of the universal language of the Act, it is not required in every case it be construed to reach literally every carrier, regardless of justice, equity, and the obvious

purpose, spirit and intendment of the act; and that the judicial assumption will be indulged in, that the "circumstances in which, and the purpose for which, the law was passed, import an exception in a case like this"; and that under the circumstances of this case, it will be the judgment of the Court, either, that if the Adamson Law was applicable to Plaintiff in Error and its Trainmen, its application was legally and properly to the old Schedule, or Schedule "A", or if the act was not applicable to Plaintiff in Error and its Trainmen, all legal requirements upon Plaintiff in Error were satisfied by continued payment under Schedule "D" during the control period of the Adamson Law.

We earnestly contend, therefore, that the District Court erred in entering Judgment against Plaintiff in Error, and that the same should be reversed.

Respectfully submitted,

LEWIS & ELLIOTT
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